

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 9, 2008 Session

**VANDERBILT UNIVERSITY v. NEW HOPE PHARMACEUTICALS, INC.**

**Appeal from the Chancery Court for Davidson County  
No. 07-1663-IV Richard H. Dinkins, Chancellor**

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**No. M2008-00362-COA-R3-CV - Filed October 16, 2008**

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The trial court granted a default judgment against defendant after striking defendant's answer because it failed to comply with the Tennessee Rules of Civil Procedure. Defendant's subsequent motion under Tenn. R. Civ. P. 60.02 to set aside the default judgment upon the ground of mistake was denied, and defendant appeals. Defendant contends that it failed to comply with the relevant law because it did not have the assistance of an attorney and was itself ignorant of the law. Upon our determination that defendant's failure to hire an attorney was a willful act and because the grounds asserted by defendant do not support relief under Rule 60.02, we do not find that the trial court abused its discretion in failing to set aside the default judgment. Accordingly, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Cause Remanded**

SHARON G. LEE, Sp. J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

M. Katherine Everette, Nashville, Tennessee, for the appellant, New Hope Pharmaceuticals, Inc.

Andree Sophia Blumstein & Leona Marx, Nashville, Tennessee, for the appellee, Vanderbilt University.

**OPINION**

***I. Background***

In 1998, Vanderbilt University ("Vanderbilt") and Oncohelp, LLC ("Oncohelp"), entered into a license agreement, pursuant to which Vanderbilt granted Oncohelp exclusive license to make, use, and market certain specified licensed products and processes related to the treatment of cancer.

Subsequent to the agreement's execution, New Hope Pharmaceuticals, Inc. ("New Hope"), a Delaware corporation, became Oncohelp's successor in interest as a party to the license agreement.

On July 26, 2007, Vanderbilt filed a complaint in the Chancery Court for Davidson County requesting a judgment that, inter alia, the license agreement between itself and New Hope had expired as a result of New Hope having suspended business and that all rights under such agreement reverted to Vanderbilt. New Hope was served with the complaint on July 30, 2007. Although New Hope was required to file its response to the complaint by August 29, 2007, on August 23, 2007, New Hope requested, and was granted, an additional thirty days, until September 28, 2007, in which to respond. By letter dated September 26, 2007, and filed with the trial court on September 28, 2007, New Hope responded to Vanderbilt's complaint. This letter was not signed by an attorney on behalf of New Hope, but rather, by New Hope's chairman and president, David Hankins, Ph.D., who is not an attorney and, therefore, was prohibited from representing New Hope in the case.<sup>1</sup>

By letter dated October 5, 2007, counsel for Vanderbilt notified New Hope, as follows, that New Hope's letter did not comply with Tennessee law:

As you know, my client, Vanderbilt University (Vanderbilt), filed a Complaint against New Hope Pharmaceuticals (NHP) on July 26, 2007. The original deadline for NHP's responsive pleading was August 29, 2007. On August 23<sup>rd</sup>, you wrote a letter requesting an extension, and Vanderbilt immediately agreed to provide NHP an additional month to respond.

We recently received a letter signed by you, dated September 26, 2007. The letter is addressed to the Clerk of the Court, and purports to respond to the Complaint. Please be advised that your letter is not a valid pleading under the Tennessee Rules of Civil Procedure and applicable caselaw, including, but not limited to Rule 11.01.

Tennessee Rule of Civil Procedure 11.01, referenced in Vanderbilt's letter, provides as follows:

Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, and Tennessee Board of Professional Responsibility number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature

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<sup>1</sup>"[A] corporation cannot act *pro se* in a court proceeding nor can it be represented by an officer or other non-lawyer agent." *Old Hickory Eng'g & Mach. Co. v. Henry*, 937 S.W.2d 782, 785 (Tenn. 1996).

is corrected promptly after being called to the attention of the attorney or party.

As of November 16, 2007, New Hope had not responded to the notification that its answer was deficient nor had it sought to remedy such deficiency. Accordingly, on that date, Vanderbilt filed a motion to strike New Hope's answer upon grounds that it was not in compliance with Tenn. R. Civ. P. 11.01 because it was not signed by an attorney and because this omission had not been promptly remedied as demonstrated by a delay in excess of forty-two days. Vanderbilt also filed a motion for default judgment upon the ground that, in light of the deficiency in New Hope's pleading and its failure to correct same, New Hope had failed to answer Vanderbilt's complaint. The trial court granted both motions.

On December 7, 2007, in accordance with Tenn. R. Civ. P. 60.02, New Hope filed a motion to set aside the order granting the default judgment, and one month later, on the morning of the hearing of such motion, New Hope filed an answer signed by its attorney. Upon review of the record and argument of counsel, the trial court denied New Hope's motion to set aside the default judgment. New Hope appeals that ruling.

## ***II. Issue***

The sole issue we address is whether the trial court abused its discretion in denying New Hope's motion to set aside the default judgment.

## ***III. Analysis***

### ***A. Standard of Review***

We review a trial court's denial of a Rule 60.02 motion for relief from a default judgment under an abuse of discretion standard. *Tenn. Dep't of Human Serv. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985). In *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001), the Tennessee Supreme Court stated as follows regarding the abuse of discretion standard:

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

An abuse of discretion occurs when the lower court's decision is without a basis in law or fact and is, therefore, arbitrary, illogical, or unconscionable. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 191 (Tenn. 2000).

### ***B. Rule 60.02 Motion***

Rule 60 of the Tennessee Rules of Civil Procedure generally provides relief from judgments and orders. Rule 60.02 specifically allows a party relief from a final judgment as follows:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

It is well-settled that courts favor a trial on the merits rather than judgment by default, *see Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn. 2003), and that Rule 60 should be construed liberally to afford relief from a default judgment. *Barbee*, 689 S.W.2d at 867. In any event, however, a party seeking relief under Rule 60.02 bears the burden of presenting ample evidence of the basis upon which it seeks to have the judgment against it set aside. *Henry*, 104 S.W.3d at 482; *Brumlow v. Brumlow*, 729 S.W.2d 103, 106 (Tenn. Ct. App. 1985). Liberal application of relief under Rule 60.02 is not appropriate if the party in default has failed to establish proper grounds for relief. *Roberts v. Todd*, No. M2003-02594-COA-R3CV, 2004 WL 2964717 at \*3 (Tenn. Ct. App. M.S., filed Dec. 21, 2004).

Specifically, New Hope argues that it is entitled to have the default judgment set aside pursuant to subsection one of Rule 60.02, which provides for relief from a final judgment for "mistake, inadvertence, surprise or excusable neglect." As stated in *Henry*, 104 S.W.2d at 481, factors instructive in determining whether a default judgment should be set aside pursuant to that subsection "include: (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted." New Hope contends that it has satisfied all of these criteria, and therefore, the trial court should have set aside the default judgment. We disagree.

We disagree that New Hope's motion to set aside the default judgment set forth allegations

showing that it made mistakes of the kind which are grounds for relief under Rule 60.02. Such allegations provided as follows:

Counsel was not be [sic] obtained prior to November 29, 2007, as New Hope Inc.'s President was working with opposing counsel as well as Vanderbilt University staff to resolve this matter.

As counsel for Defendant was not retained until the day prior to the default hearing, New Hope, Inc. was not in a position to file an Answer conforming to the Rules of Civil Procedure prior to the hearing and be properly before the court.

New Hope's management was not aware that an attorney retained on the day prior to the default hearing could not prevent a default from occurring by merely appearing in court due to the local rules.

Counsel indicated at the hearing that she had been retained the prior day and would be filing a Motion to Set Aside Default Judgment along with an Answer comporting to [sic] the Rules of Civil Procedure.

...

Defendant would submit that the President of New Hope Pharmaceuticals attempted to file an Answer with the Court, not knowing of any rule that would actually preclude him from being heard by the Court on behalf of the New Hope Pharmaceuticals.

In filing an Answer on behalf of New Hope, Defendant's management was under the good faith belief that he could explain the Company's situation to the Court and would prevail against what he believes he can prove to be unjust and inaccurate allegations on the part of Plaintiff.

Defendant New Hope Pharmaceuticals has limited financial resources, and its management was hesitant to have New Hope incur sizable legal fees for claims management believed it could adequately address.

New Hope would submit that its management has diligently attempted to address Plaintiff's claims, yet made mistakes by inadvertently failing to follow local rules not known to Defendant's management.

As we construe these allegations, they may be summarized as asserting that New Hope did not hire an attorney until the day before the default judgment hearing because of its desire to avoid legal fees, and, as a consequence of its failure to obtain proper legal advice and its own misunderstanding of its legal obligations, New Hope failed to comply with Tenn. R. Civ. P. 11.01. Thus, the mistake that New Hope alleges in support of its motion for relief under Rule 60.02 is its ignorance of the law due to its failure to retain an attorney. We do not agree that such a mistake suffices as a ground for relief under Rule 60.02.

By its own admission, New Hope has failed to satisfy the first of the three criteria delineated in *Henry* by showing that its default was not willful. To the contrary, New Hope states that it failed to employ a lawyer because it did not wish to incur costs. Thus, its decision to represent itself was the intentional result of a cost benefit analysis. Furthermore, proof that a party's dereliction in complying with the law as an outcome of its decision not to hire an attorney does not constitute evidence of "mistake, inadvertence, surprise or excusable neglect" meriting relief under Rule 60.02. See *In re Estate of Mayes*, 843 S.W.2d 418, 426 (Tenn. Ct. App. 1992). Finally, as noted by the Tennessee Supreme Court in *Food Lion, Inc. v. Wash. Co. Beer Bd., et al.*, 700 S.W.2d 893, 896 (Tenn. 1985), ignorance of the law is not a proper ground for relief under Rule 60.02. As the Court stated in that case, "[i]f this Court were to hold that ignorance of the law is a proper ground for relief under Rule 60.02, Tennessee Rules of Civil Procedure, it is hard to conceive how any judgment could be safe from assault on that ground." *Id.* As we have further stated on prior occasion, ignorance of the Tennessee Rules of Civil Procedure will not justify relief under Rule 60.02, whether the party in default was proceeding with or without the assistance of an attorney. *Ford v. Turley*, 1992 WL 120237 at \*3 (Tenn. Ct. App. W.S., filed June 5, 1992). For all of these reasons, we do not agree that the trial court abused its discretion in failing to set aside the default judgment against New Hope.

#### ***IV. Conclusion***

For the aforementioned reasons, the judgment of the trial court is affirmed. Costs of appeal are assessed to the appellant, New Hope Pharmaceuticals, Inc., for which execution may issue if necessary.

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SHARON G. LEE, SPECIAL JUDGE